

NG WU HONG

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v.

ABRAHAM VERGHESE TV ABRAHAM & ORS

HIGH COURT SABAH & SARAWAK, KUCHING

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RAVINTHRAN PARAMAGURU JC

[SUIT NO: 22-47-2005-II]

11 JANUARY 2011

CIVIL PROCEDURE: *Action - Limitation - Breach of duty of care - CEO of company suing company's auditors for breach of duty of care - Cause of action falling under item 19 Limitation Ordinance of Sarawak - Whether claim time barred*

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CIVIL PROCEDURE: *Cause of action - Whether cause of action arising - Auditors retained by company to carry out audit - Whether company's CEO may personally sue company's auditors for breach of contract or in negligence*

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COMPANY LAW: *Auditors - External auditor - Scope of duty of company's auditors - Whether duty is merely to provide independent report to shareholders on company's performance - Whether auditors owe a duty to check accuracy of management accounts and to detect fraud - Whether auditors owe a duty to company's CEO - Companies Act 1965, s. 172*

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TORT: *Damages - Remoteness - CEO of company suing company's auditors for breach of duty of care - Claim for loss of emoluments, stock options and employment benefits - Whether losses not foreseeable, too remote and highly speculative*

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TORT: *Negligence - Duty of care, whether arising - Whether company's auditors owe a duty of care to company's CEO - Whether company's CEO may claim against company's auditors for losses caused by negligent audit*

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The defendants were partners in a firm of auditors which had performed a statutory audit under s. 172 of the Companies Act 1965 ('CA65') on the accounts of Sarawak Securities Sdn. Bhd. (SSSB), a stock broking company. The plaintiff who was the Chief Executive Officer (CEO) of SSSB later resigned after SSSB suffered losses on its unsecured margin accounts. The plaintiff then brought this action against the defendants. The plaintiff

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- A alleged that the defendants as auditors were liable for negligent misstatement because their audit failed to disclose the fraud that was going on in SSSB. It was claimed that the defendants' statutory audit reports issued to the shareholders did not disclose a serious irregularity in the accounts, *ie*, that the margin accounts
- B of SSSB were secured by phantom shares. The fraud was said to have been perpetrated in the Margin Accounts Department which was headed by its manager who had since absconded. The plaintiff contended that he would not have had to resign if the defendants had detected the fraud. The plaintiff therefore claimed
- C damages for loss of his salary, bonus, share options and other benefits lost due to his resignation. The defendants denied owing a duty of care to the plaintiff as the CEO of SSSB. They defendants contended that their statutory duty was to report solely to the shareholders of SSSB. The following issues arose for
- D determination: (i) whether the plaintiff's claim was barred by limitation; (ii) whether the defendants owed a duty of care to the plaintiff and whether the duty was breached; (iii) whether the plaintiff himself was contributorily negligent in failing to detect the fraud; (iv) whether the plaintiff was forced to resign; and (v)
- E remoteness of the damages claimed.

Held (dismissing the plaintiff's claim with costs):

- (1) In order to bring a cause of action within the ambit of item
- F 94, there must be a contract between the plaintiff and the defendants. The retainer for the audit assignment was only between SSSB and the defendants. The audit report was also addressed to the shareholders. Since the claim was not based on contract but on the alleged breach of duty of care owed
- G by the defendants to the plaintiff who was a third party, it fell squarely under item 19. The cause of action in negligence also could not fall under Item 97 as it is a residuary item. The limitation period under Item 19 is two years. The audit reports were prepared in 1998 and the writ was only filed in 2005. The plaintiff was clearly barred by limitation from filing the suit.
- H (para 10)
- (2) The defendants did not owe a duty of care to the plaintiff. The role of an external auditor as prescribed in the CA65 is to provide an independent report to the shareholders about the performance of a company. The statutory provisions do not envisage the use of the reports by the CEO to check the accuracy of the management accounts. (para 25)
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- (3) Since the defendants did not owe a duty of care to the plaintiff and since the plaintiff was wholly responsible for failing to detect the fraud, the question of apportioning liability between the plaintiff and defendants did not arise. (para 44) A
- (4) There was no evidence of SSSB threatening to dismiss the plaintiff. The plaintiff had left on his own accord to take responsibility for his failure to prevent the fraud. Hence, there was no foundation for alleging that his losses were caused by the defendants. (para 47) B
- (5) Even if the defendants had performed their statutory audit negligently, the only damage that was foreseeable was the loss due to the non-existent collaterals. This loss was suffered by SSSB and not by the plaintiff. The plaintiff's claim for loss of emoluments and stock options was thus unjustified. The plaintiff's claim for loss of profit from the stock option was also highly speculative. (paras 48 & 49) C
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Case(s) referred to:

- Candler v. Crane, Christmas & Co* [1951] 2 KB 164 (*refd*)
- Caparo Industries Sdn Plc v. Dickman* [1990] 1 All ER 568 (*refd*) E
- Donoghue v. Stevenson* [1932] AC 562 (*refd*)
- Fomento Ltd v. Selsdon Ltd* [1958] 1 All ER 11 (*refd*)
- Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 (*refd*)
- Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506 (*refd*)
- Man Singh v. Ram Nath* AIR [1924] Allahabad 828 (*refd*)
- Pacific Acceptance Corporation Ltd v. Forsyth* [1970] 92 WN (NSW) 29 (*refd*) F
- PlanAssure PAC v. Gaelic Inns Pte Ltd* [2007] 4 SLR 513 (*refd*)
- Ross v. Caunters* [1979] 3 All ER 580 (*refd*)
- Sa'adi Ibrahim & Anor v. Liew Han Sin & Anor* [2006] 6 CLJ 111 HC (*refd*) G
- Smith v. Eric S Bush* [1989] 2 All ER 514 (*refd*)
- SR Manickavasagam @ Rajamanickam v. G Muthuveeraswami Naidu & Ors* AIR [1963] Madras 362 (*refd*)
- Vun Chun Fah & Anor v. Telekom Malaysia* [1997] 1 LNS 165 HC (*refd*)
- Wong Kok Chin v. Singapore Society of Accountants* [1989] 1 LNS 138 HC (*refd*) H

Legislation referred to:

- Companies Act 1965, ss. 172, 174
- Sabah Limitation Ordinance, item 20
- Sarawak Limitation Ordinance, s. 24, Schedule, Items 19, 94, 97
- Securities Industry Act 1973, s. 87 I
- Securities Industry Regulations 1983, reg. 14

A *For the plaintiff - Mekanda Singh Sandhu (Satinder Singh Sandhu with
him); M/s Sandhu & Co Advocates*
For the defendants - James Lo; M/s George Lo & Partners Advocates
Reported by Amutha Suppayah

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JUDGMENT

Ravinthran Paramaguru JC:

C **Introduction**

[1] The defendants are partners of a firm of auditors. They had performed a statutory audit under s. 172 of the Companies Act 1965 on the accounts of Sarawak Securities Sdn. Bhd. (SSSB) which is a stock broking company. The plaintiff was the Chief Executive Officer (CEO) of the company at the material time. The statutory audit reports issued by the defendants to the shareholders did not disclose a serious irregularity in the accounts, ie, that the margin accounts of SSSB were secured by phantom shares. The plaintiff's case is that he was forced to resign after the company suffered losses to the tune of RM56 million on its unsecured margin accounts. He is alleging that the defendants as auditors are liable for negligent misstatement because their audit failed to disclose the fraud through which phantom shares had been created as collaterals for the margin accounts in question. This, in a nutshell, is the case of the plaintiff.

Case For The Plaintiff

[2] The plaintiff is the CEO of SSSB which had been granted a stock broking licence since 1991 by the Ministry of Finance. He is also a director of SSSB. As CEO he reported to the Board of Directors which is headed by an Executive Chairman. The defendants were all former partners of a well known international accounting and audit firm known as Arthur Andersen Associates (AA). The firm was appointed as external auditors between 1993 and 1999. The case of the plaintiff is based on the report of the defendants for the financial year 1998. As external auditors of SSSB, the defendants produced three reports pursuant to the statutory requirements in respect of accounts for the 1998 financial year:

- (1) a report pursuant to s. 174, Companies Act 1965; A
- (2) an auditor's report in Form 20 (Securities Industries Regulations 1983); and
- (3) an auditor's report to the General Manager KLSE pursuant to r. 16(1) of KLSE Rules relating to Member Companies. B

[3] It is common ground that the defendants, in their audit, did not detect any fraud in the accounts of SSSB for the year 1998. In the Form 20 report, the defendants stated, *inter alia*, that from their test examinations and due inquiry they were of the opinion that "the internal procedures are adequate having regard to the nature of the business of the dealer". However, a massive fraud was discovered in April of 1999. The fraud was uncovered when SSSB set up a Custodian Services Department for its institutional clients to custodise their scriptless shares. SSSB discovered that "phantom shares" had been keyed into clients' margin account shares. The non-existent shares provided false security for the margin accounts. This scheme was hatched to avoid the forced selling of shares in various margin accounts for the purposes of regularizing the accounts. The elaborate fraud was believed to have been devised and perpetrated in the Margin Accounts Department which was headed by its manager, one Winnie Leong. Upon discovery of this fraud, the defendants were called in to investigate the extent of the fraud. The defendants produced a report in May of 1999 stating that there were discrepancies in the total sum of RM56 million in the margin accounts of SSSB. On 21 June 1999, the defendants produced another report detailing how the "phantom shares" were keyed in. SSSB later retained another international accounting and auditing firm, Ernst and Young, to give an opinion whether an audit of the financial statements of SSSB for the year ended 31 December 1998, if carried out in accordance with the generally accepted auditing standards, would have disclosed the existence of the fictitious collateral, ie, the alleged phantom shares. Ernst and Young produced a draft report known as "Review Report on Work Performed by External Auditors" (the E & Y Report) dated 25 August 1999 which stated that:

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... that the financial statements of SSSB as at 31.12.1998 had been materially misstated and that had an auditor adhered to generally acceptable auditing standards in the performance of his duties, he would have had a reasonable probability of detecting such a material misstatement.

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A [4] Subsequent to a criminal investigation by the Securities Commission, the plaintiff and two other staff of SSSB were charged on 11 November 1999 under s. 87 of the Securities Industry Act for committing fraud. The plaintiff was convicted and sentenced to two years imprisonment. The conviction was later
B overturned by the High Court. The appeal from this decision is now pending before the Court of Appeal. Winnie Leong was not tried as she had absconded and is still at large.

C [5] The plaintiff resigned as CEO of SSSB on 30 September 1999. His basic argument in this Suit is that had the defendants detected the fraud in its auditors' reports for the year 1998, he would not have been "forced" to resign. In the amended statement of claim, the plaintiff claims damages as follows:

Particulars of Loss		
General and Special Damages		
(a) Annual Basic Salary (RM800,000 x 13 years)		RM10,400,000
(b) Bonus (RM1,500,000 x 13 years)		RM19,500,000
(c) Share Option (5 million option on CMS Capital shares at RM1 per share taken at a tradable book value)		RM 5,000,000
(d) Car and Driver (RM36,000 x 13 years)	RM	468,000
(e) Overseas Travel (RM20,000 x 13 years)	RM	260,000
(f) Housing (RM60,000 x 13 years)	RM	780,000
(g) Special Damages		RM 5,000,000
Total		RM41,404,000
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Case For The Defendants

I [6] The defence, in summary, is that the defendants as external auditors did not owe a duty of care to the plaintiff who is the CEO of SSSB. The defendants had statutory duty to report solely to the shareholders of SSSB. There was no privity of contract

between the plaintiff and the defendants. It is the duty of the CEO to ensure that the accounts he signed are correct and he cannot rely on the external auditors' report to relieve him of that duty. The defendants denied that they were negligent and alleged that the plaintiff himself was negligent in failing to detect the fraud. In respect of the loss of income suffered by the plaintiff, the defendants averred that he resigned voluntarily.

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Issues

[7] After considering the submissions of the parties, it is my view that the core issues that arise are as follows:

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(1) Whether the claim is barred by limitation law?

(2) Whether a duty of care is owed by the defendants to the plaintiff?

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(3) Whether the duty of care was breached?

(4) Whether any contributory negligence?

(5) Whether plaintiff was forced to resign?

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(6) Remoteness of damage

Issue No. 1: Limitation

[8] The plaintiff's case is that his cause of action falls under Item 94 or 97 of the Schedule to the Limitation Ordinance of Sarawak. Items 94 and 97 provide a six-year limitation period. Item 94 is in respect of "For compensation of a breach of contract in writing". The limitation period is stated to run from "a suit brought on a similar contract not in writing." Item 97 is a residuary provision. It is for a suit "for which no period of limitation is provided elsewhere in this Schedule". Counsel for plaintiff has argued that the claim is based on negligence which arises from a breach of a contractual obligation to exercise reasonable care and skill in preparing the audit reports. Counsel for plaintiff submitted that the limitation period is six years and it runs from the moment injury was suffered. He cited s. 24 of the Limitation Ordinance which reads as follows:

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A In the case of a suit for compensation for an act which does not give rise to cause of action unless some specific injury results therefrom, the period of injury shall be computed from the time when the injury results.

B [9] However, with respect, I do not think that counsel for plaintiff is right to submit that the cause of action falls under item 94 or 97. Article 94 clearly refers to a contract in writing. In the instant case, it is abundantly clear that the plaintiff had no contract, either written or oral, with the defendants. The party that had entered into agreement with the defendants to carry out the statutory audit and produce the three reports was SSSB. I have given careful consideration to the argument of counsel for plaintiff that the cause of action was in “negligence” arising from breach of a contractual obligation. Counsel for plaintiff submitted as follows:

D From the foregoing, it is reasonable to hold that it was an implied term of the defendants’ contract with SSSB to provide these audit reports to the plaintiff in connection with his duties as CEO and director of SSSB, *inter alia*, to safeguard the property and interests of SSSB and its clients. Thus, it was an implied term of the defendants’ retainer, as external auditors, to exercise reasonable care and skill in preparing the said reports to be read by the plaintiff. The plaintiff and the defendants were clearly brought into a special relationship by virtue of the latter’s contractual obligation as external auditors to produce the three audit reports.

G [10] To put it in a nutshell, the argument of counsel for plaintiff is that by failing to discover the fraud that was perpetrated on SSSB, the defendants had breached their duty of care that is impliedly owed to the plaintiff as he is the CEO. In my opinion, in order to bring a cause of action within the ambit of item 94, there must be a contract between the plaintiff and the defendants. In the instant case, it is common ground that the retainer for the audit assignment was only between SSSB and the defendants. Furthermore, under s. 174 of the Companies Act, the audit report is addressed to the shareholders. It is trite law that a company is a separate entity from its principal officers or its shareholders. In the premises, the argument that the cause of action of the plaintiff who is only the CEO of SSSB arose from the retainer to perform

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the statutory audit reports in question cannot be accepted. Even if the defendants were negligent in preparing the audit reports in question, by not discovering the fraud, the duty of care based on contract would have been owed to the shareholders by virtue of s. 174 or to SSSB by virtue of the retainer. As the plaintiff had no contract with the defendants, his cause of action cannot fall under item 94 of the schedule to the Limitation Ordinance of Sarawak which envisages a contractual relationship between the parties. I am mindful of the argument of counsel for plaintiff that the claim of the plaintiff in negligence arose from a written contract between the defendants and SSSB. He had cited authorities (*Ross v. Caunters* [1979] 3 All ER 580 and *Smith v. Eric S Bush* [1989] 2 All ER 514) to argue that a contractual obligation can give rise to a duty to take care to a third party. Counsel for defendants has not taken exception to the principle in the above cases. However, the issue at hand is not whether the plaintiff can found a cause of action based on the principle enunciated in the above authorities. The issue is whether the cause of action falls under Item 94 of the schedule to the Limitation Ordinance of Sarawak. Even assuming that the plaintiff can prove his claim that the defendants were negligent in the performance of their duty as auditors, it cannot be argued that they breached their contractual obligation to the plaintiff as the parties did not enter into a contract. Therefore, the cause of action cannot come under Item 94 in the instant case. The plaintiff has pleaded that the defendants should have foreseen that the plaintiff would read the audit reports as he was the CEO of SSSB and therefore there was a duty on the part of the defendants to exercise due care. In the event the plaintiff succeeded in proving that the defendants owed a duty of care to the plaintiff, the claim of the plaintiff is housed under the tort of negligence and not under contract as the parties did not enter into a contractual relationship. To put it another way, it would be a claim that arises in contract only insofar as SSSB is concerned. Item 19 of the schedule of the Limitation Ordinance of Sarawak reads as follows:

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A	Description of Suit	Period of Limitation	Time from which period begins to run
	19. For compensation for any malfeasance, misfeasance or	Two years	When the malfeasance, misfeasance or non- feasance takes place.
B	non-feasance independent of contract and not herein specially provided for		
C	[11] In <i>Vun Chun Fah & Anor v. Telekom Malaysia</i> [1997] 1 LNS 165, Ian Chin J held that Item 20 of the Limitation Ordinance of Sabah which is in <i>pari materia</i> with Item 19 of the Schedule of the Limitation Ordinance of Sarawak applies to a claim in negligence. Since the instant claim is not based on contract but		
D	on the alleged breach of duty of care owed by the defendants to the plaintiff who is a third party, in my view, it falls squarely under item 19. It follows that the cause of action in negligence cannot fall under Item 97 as it is a residuary item. Item 97 can only be		
E	invoked if a cause of action is not covered under any other item (see <i>Sa'adi Ibrahim & Anor v. Liew Han Sin & Anor</i> [2006] 6 CLJ 111 and the Indian cases of <i>S.R. Manickavasagam @ Rajamanickam v. G. Muthuveeraswami Naidu & Ors</i> AIR [1963] Madras 362 and <i>Man Singh v. Ram Nath</i> AIR [1924] Allahabad 828 cited therein).		
F	The limitation period under Item 19 is only two years. The audit reports were prepared in 1998. The writ was only filed in 2005. The plaintiff was therefore clearly barred by limitation law from filing this suit.		
G	[12] Counsel for defendants submitted that even if the cause of action of the plaintiff in negligence falls under Item 94 or 97 and the limitation period is six years, the limitation period was over when the action was filed. In my opinion, the defendants' submission is correct. My reasons are as follows. The writ in this case was filed on 20 April 2005. Under Item 97, the limitation		
H	period runs from the time of accrual of action. In the instant case, a cause of action in negligence would arise when the last of the three reports were signed off by the defendants in March of 1999. The writ was however filed on 20 April 2005. The plaintiff is therefore late by at least one month. For all the above reasons, in		
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my opinion, the claim of the plaintiff should be dismissed on the limitation point alone. However, in the event I am wrong on this point, I shall proceed to address the other issues in this case.

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Issue No. 2: Whether A Duty Of Care Is Owed To The Plaintiff?

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[13] As stated earlier, the plaintiff is the CEO of the company whose accounts were audited by the defendants. Counsel for plaintiff was unable to cite any authority that held that an officer of a company is entitled to sue the auditors either in contract or tort for failing to discover fraud in their audit. Counsel for plaintiff however cited a number of authorities (*Candler v. Crane, Christmas & Co* [1951] 2 KB 164, *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465, *Pacific Acceptance Corporation Ltd. v. Forsyth* [1970] 92 WN (NSW) 29, *Caparo Industries Sdn. Plc v. Dickman* [1990] 1 All ER 568, *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506) that considered the duty to take care which is the foundation of the modern law of negligence. Of course, the starting point is the celebrated House of Lord's case of *Donoghue v. Stevenson* [1932] AC 562. Before that case, it was thought that in the absence of contractual obligations, the duty of care was confined to very limited circumstances. Lord Atkins, in memorable words, ruled that:

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You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

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[14] He then proceeded to define a 'neighbour' in law as follows:

The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.

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[15] The next major development in the law was the dissenting judgment of Lord Denning in *Candler v. Crane, Christmas & Co* [1951] 2 KB 164 which was cited by counsel for plaintiff. This case concerned the preparation of accounts by the defendants who are a firm of auditors. The plaintiff was interested in investing some money in a company provided that he could see its accounts. The company instructed the defendants to prepare the accounts. The accounts were shown to the plaintiff in the

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- A presence of the clerk of the defendants. The plaintiff relied on the accuracy of the accounts and invested £2000 in the shares of the company. The company's financial position was not as healthy as depicted in the accounts and the plaintiff lost his investment. As
- B brought an action in tort for negligent misrepresentation. The Court of Appeal by a majority dismissed the case as there was no contractual relationship between the parties. However, Lord Denning, in his famous dissenting judgment held the defendants were liable, notwithstanding the absence of a contractual
- C relationship because they knew that the accounts in question were required for the guidance of the plaintiff in investing in the company. The basis of the law on professional negligence was laid down by Lord Denning in the following oft-quoted passage:
- D Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money
- E or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they are
- F not, as a rule, responsible for what he does with them without their knowledge or consent. ... The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him?
- G [16] As is well known, the dissenting judgment of Lord Denning in *Candler v. Crane, Christmas & Co (supra)* was approved by the House of Lords in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465. This is a landmark case in the English law of torts. The parties in the case also did not have a contractual relationship. The plaintiff company who were advertisers wanted to
- H know the credit worthiness of their customer, Easipower Ltd. The plaintiff's bank contacted Easipower Ltd's bank, Heller & Partners Ltd who told them in a letter that Easipower Ltd was:

... considered good for its ordinary business engagements.

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[17] There was no contract as the letter was given free of charge. But it contained a disclaimer. The letter was headed: A

For private use and without responsibility on the part of this bank or its officials.

[18] The plaintiff lost £17,000 on contracts as Easipower went into liquidation. The plaintiff brought a suit for negligent misstatement against the defendant. The case was ultimately dismissed because of the disclaimer clause in the letter. However, the House of Lords ruled that the defendant had a duty of care because of the proximity of the parties and because they possessed a special skill. Lord Morris said as follows: B C

I consider that it follows and that it should now be regarded as settled that if someone possessing special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise. D E

[19] Both *Candler v. Crane, Christmas & Co* and *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* (*supra*) were cases where the plaintiff had brought an action for negligent misstatements in tort because the parties did not have a contractual relationship. The third major case in the area of negligent misstatement is *Caparo Industries Sdn. Plc v. Dickman* [1990] 1 All ER 568. This case was also cited by counsel for plaintiff. It also dealt with the duty of care in English law. Similar to *Candler v. Crane, Christmas & Co. (supra)*, the case concerned accounts prepared by a firm of auditors. The plaintiff was preparing to take over a company called Fidelity PLC which was doing badly. Its share price fell by half in March of 1984. It fell further in May of 1984 after the announcement of its profits. The plaintiffs began buying up its shares in large numbers. In June of 1984, the annual accounts which were prepared by the defendant were issued to the shareholders that included the plaintiff. The plaintiff managed to F G H I

A take over the company but found that its stock had been overvalued and the after sales credit had been understated. It sued the directors of Fidelity PLC and the auditors for negligence and sought to recover the difference in the value of the company had the accounts been accurate. The High Court ruled that there
B was no common law duty to individual shareholders such as would enable an individual shareholder to recover damages for loss sustained by him in acting in reliance upon the audited accounts. However, the Court of Appeal allowed the appeal. The Court of
C Appeal held that whilst there was no relationship between an auditor and a potential investor sufficiently proximate to give rise to a duty of care at common law, there was such a relationship with individual shareholders, so that an individual shareholder who suffered loss by acting in reliance on negligently prepared accounts, whether by selling or retaining his shares or by purchasing
D additional shares, was entitled to recover in tort. This decision was however overturned by the House of Lords who held that liability in negligent misstatement was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which
E the recipient had relied and acted to his detriment. The House of Lords propounded the three fold test in establishing the duty of care which is “foreseeability”, “proximity” and “reasonableness”. Lord Bridge discussed the three fold test as follows:

F What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation
G should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[20] However, counsel for plaintiff also cited the latter case of *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506 in which
H Lord Goff at the House of Lords appeared to reject the ‘reasonableness’ test in the following passage:

I It follows that, once the case is identified as falling within the Hedley Byrne principle, there should be no need to embark upon any further inquiry whether it is ‘fair, just and reasonable’ to impose liability for economic loss – a point which is, I consider, of some importance in the present case.

[21] Reverting to the facts of the present case, counsel for plaintiff submitted that the defendants admitted in the re-amended statement of defence that they knew that the plaintiff would read the audit reports. He said that the reason should have been obvious to the defendants. As the CEO of SSSB, the plaintiff wanted to:

... to ensure that the company had in place an adequate internal control system to prevent malpractices and fraud and he was required to report to the board and the relevant authorities on the financial state of the company. The auditor's reports provided independent assurances to the plaintiff that internal control procedures were adequate.

[22] Counsel for plaintiff submitted that in respect of the Auditor's Report in Form 20, prescribed under regs. 14 of the Securities Industries Regulations 1983, the defendants were required to make proper inquiries and to conduct checks and test examinations of clients' securities. Counsel for plaintiff argued that the results of the audit would have to be disclosed to the plaintiff by virtue of the special relationship between the parties, ie, the plaintiff was the CEO and dealers' (SSSB) representative to the KLSE and the defendants were its auditors. He further argued that the shareholders had no access to the defendants but it was the duty of the plaintiff as the CEO to provide them with access to the information they require in the performance of their duties. In conclusion, counsel for plaintiff submitted that the test on proximity as enunciated in *Candler v. Candler, Christmas & Co* as approved in *Caparo Industries Sdn. Bhd. Plc (supra)* is that:

Did AA as external auditors of SSSB know that the auditor's reports prepared by them were required for submission to the Plaintiff and used by him?

[23] Counsel for plaintiff answered the question in the affirmative for the reasons I summarized above.

[24] Counsel for the defendants, on the other hand submitted that no duty of care was owed by the defendants to the plaintiff for the following reasons. The plaintiff as the CEO had the overall responsibility to detect any fraud that was perpetrated within his company. The defendants as external auditors were required to prepare the statutory reports for the benefit of the shareholders and the regulators. The reports were not prepared for the benefit

- A of the CEO although the defendants knew that he would read them. The reports were prepared and signed off in early 1999. They covered the period from January to December of 1998. Therefore even if the defendants had detected the fraud, it would have only been disclosed in the audit reports in early 1999. Thus
- B the CEO could not have prevented the fraud that occurred in 1998. The defendants were not appointed by the CEO but by the general meeting of the shareholders. Therefore any damage as a result of the failure to detect the fraud is only actionable by the shareholders or the company itself.
- C [25] In my opinion, the defendants did not owe a duty of care to the plaintiff. My reasons are as follows. In considering the three fold test propounded in the *Caparo* case, I shall first consider the issue of foreseeability. To my mind, it was foreseeable that the
- D CEO would read the audit reports prepared by the defendants. The defendants in fact admitted as much in the re-amended statement of defence. The admission is not surprising. Any responsible CEO would want to read the external audit reports on his company's accounts. These reports are after all, an
- E independent report to the shareholders about the financial health of the company, ie, a sort of report card on the management team. However, the defendants did not admit in the re-amended statement of defence that they knew that the plaintiff would "rely" on the audit reports either in the management of the company or
- F in signing off his own statutory reports as SSSB's dealer. The defendants' witnesses also did not testify in court that they expected the plaintiff to "rely" on their reports before signing off his own reports. Very interestingly, the plaintiff himself did not say that the defendants knew that he was relying on their reports to
- G sign off his own reports as CEO. Counsel for plaintiff submitted that this fact can be inferred. In my opinion there is no room for such an inference because the whole purpose of the institution of the external auditor is to provide a check and balance on the performance of the management of a company. This is the reason
- H the plaintiff himself agreed during cross-examination that the external auditors were required to perform their duties independently of the management of the company. Furthermore, the role of an external auditor has been statutorily prescribed in the Companies Act 1965. It is to provide an independent report to the shareholders about the performance of a company. The Act
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does not say that the external auditors' report is to assist the management of the company to determine whether it is carrying out its own duties properly. In fact in the House of Lords judgment in *Caparo* which was cited by the counsel for plaintiff, there are numerous passages that refer to the independent role of the external auditor who owes no duty to anyone save the shareholders collectively and the company. Some of these passages bear repetition here. In the Court of Appeal of judgment of the *Caparo* case [1989] QB 653, 680-681, Bingham LJ observed as follows on the duty of the company external auditor:

He receives his remuneration from the company. He naturally, and rightly, regards the company as his client. But he is employed by the company to exercise his professional skill and judgment for the purpose of giving the shareholders an independent report on the reliability of the company's accounts and thus on their investment. No doubt he is acting antagonistically to the directors in the sense that he is appointed by the shareholders to be a check upon them.

[26] This passage was cited with approval by Lord Bridge at the House of Lords. Lord Oliver opined that the purpose the audit was carried out was important in defining the scope of the duty of the auditors:

Thus, if and so far as the purpose for which the audit was carried out is a relevant consideration in determining the extent of any general duty in tort owed by the appellants to persons other than the company which is their immediate employer, that purpose was simply that of fulfilling the statutory requirements of the Companies Act 1985. That, in turn, raises the question – and it is one which lies at the threshold of the inquiry upon which your Lordships are invited to embark – of what is the purpose behind the legislative requirement for the carrying out of an annual audit and the circulation of the accounts. For whose protection were these provisions enacted and what object were they intended to achieve?

[27] His Lordship said that the audit was for the purpose of enabling the shareholders to collectively exercise their rights at the annual general meeting. His Lordship acknowledged that it is foreseeable that the information in the audit reports may be useful to the others such as potential investors but that was not the purpose of the legislation.

- A [28] In the instant case, it is a point of no small significance that the statutory provisions under which the reports were prepared by the defendants did not envisage the use of the reports by the CEO to check the accuracy of the management accounts prepared under his watch. Counsel for plaintiff also submitted that there
- B was an assumption of responsibility by the defendants to prepare the reports with reasonable skill and care. However, it is clear to me that any assumption of responsibility would only hold true insofar as the collective body of shareholders or the company is concerned as any damage caused by a negligent misstatement in
- C the report is actionable by them. Lord Oliver said in the *Caparo* case that any action against the auditors for negligence would have to be brought in the name of the company:

- D But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders, eg, by the negligent failure of the auditor to discover and expose a misappropriation of funds by a director of the company, will be recouped by a claim against the auditors in the name of the company, not by
- E individual shareholders.

- [29] Thus foreseeability test alone is not sufficient to found a duty of care. In order to pass the proximity test, counsel for plaintiff urged the court to consider the position of the plaintiff as
- F the CEO and draw an inference that he would rely on the audit reports. However, as I said earlier, the plaintiff himself did not say that the defendants knew that he would be relying on the said reports. The defendants only admitted that they knew he would read the reports but stopped short of saying that they knew that
- G he would rely on them. Since the purpose of the statutorily required audit reports was to provide an independent appraisal to the shareholders about the financial standing of the company, an inference that the CEO would also be relying on the said reports to sign off his own reports cannot be drawn unless there was
- H direct evidence to that effect. In the *Caparo* case, Lord Oliver in analysing the dissenting judgment of Lord Denning in the *Candler* case actually said that:

- I the plaintiff must be specifically identified as the ultimate recipient and the precise purpose for which the accounts were required must be known to the defendants,

[30] Since the precise purpose of the accounts must be made known to the defendants, it follows that no inference whatever can be drawn in this regard. There is also much force in the observation of counsel for defendants that the plaintiff's claim that the audit reports were necessary to detect any irregularities in the company is very much like placing the proverbial cart before the horse. The fraud went on undetected throughout 1998. The defendants signed off the audit reports in March of 1999. The claim is based on these reports. Therefore, even if the defendants had detected the fraud and disclosed the fraud in their reports, the discovery would have come far too late for the plaintiff to do anything about what had happened in the previous year. However, counsel for plaintiff submitted that the plaintiff only signed off his management reports after having been assured by the audit reports of the defendants. In my view this submission does not seem to take into account the bigger issue which would have been that the fraud was conducted undetected throughout 1998 in SSSB under the watch of its CEO who is the plaintiff. In the *Hedley Byrne* case, it was said that it was a condition that the:

... advice is likely to be acted on by the plaintiff for that purpose without independent inquiry and to his detriment.

[31] In the instant case, there is no evidence that the plaintiff acted solely on the audit reports prepared by the defendants without reference to his internal audit team or managers. In fact it would be a damning indictment on the plaintiff as a CEO if it were so. It goes without saying that the CEO of large company which had its own internal auditors bore responsibility to detect and prevent fraud that was committed by his own senior management officers instead of abdicating the task to the external auditors who had come in only at the end of the year. In the premises, the plaintiff failed to pass the test of proximity.

[32] In conclusion, I would rule that the defendants did not owe a duty of care to the plaintiff. It was only foreseeable that the plaintiff would read the audit reports but there is no evidence that the defendants knew that the plaintiff would rely on it. There is also no reason for the defendants to infer that the plaintiff would rely on the audit reports. The audit reports were meant for the

- A shareholders and the regulators and not the management of the company. Moreover, the CEO of the company had at his disposal an internal audit team and management team to verify the accuracy of the accounts that he was required by law to sign off. I shall now proceed to consider whether the duty of care, if any, was breached.
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Issue No. 3: Whether The Duty Of Care Was Breached?

- [33] The basis of the plaintiff's case is that the defendants had breached their duty of care as auditors as they did not source the MCD print out statements directly from the MCD terminal at SSSB or from the MCD office in Kuala Lumpur. The defendants' witnesses testified that the MCD printout statements were given to them by Winnie Leong who was the manager of the Margin Accounts Department. Unknown to the auditors at that time, Winnie Leong had not given a genuine printout from the MCD terminal. She had given a fabricated printout. Only when the Custodian Department was set up later to custodise the scriptless shares, and upon comparison of the genuine printout from the MCD terminal which is linked to the MCD office in Kuala Lumpur and the margin accounts, it was discovered that the "shares" as depicted in the printout given by Winnie Leong did not exist. The argument of counsel for plaintiff is that the defendants should have sourced the MCD printouts directly from the independent source which is the MCD terminal at SSSB or from the MCD office in Kuala Lumpur. The officer in charge of the MCD terminal at the relevant time, PW2, testified that the auditors did not request for the printout from her. Counsel for plaintiff further submitted that by failing to obtain the MCD printouts from an independent source, the defendants failed to adhere to the auditing standards that were expected of them. This appears to be the only complaint against the defendants. Therefore the only question that arises in respect of the alleged breached of duty is whether the defendants should have obtained the MCD printouts from the MCD terminal instead of from the Margins Department Manager. Again, the counsel for plaintiff could not cite any case that is directly in point. But he referred to well known passages from authoritative judgments on the duty of care of professional men.

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[34] Counsel for plaintiff cited the following passage from the judgment of Lord Denning in *Fomento Ltd. v. Selsdon Ltd.* [1958] 1 All ER 11 on the duty of auditors:

What is the proper function of an auditor? It is said that he is bound only to verify the sum, the arithmetical conclusion, by reference to the books and all necessary vouching material and oral explanations, and that it is no part of his function to inquire whether an article is covered by patents or not. I think this is too narrow a view. An auditor is not to be confined to the mechanics of checking vouchers and making arithmetic computations. He is not to be written off as a professional ladder-upper and subtractor'. His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths.

[35] In *PlanAssure PAC v. Gaelic Inns Pte Ltd* [2007] 4 SLR 513, which was also cited by counsel for plaintiff, the Singapore Court of Appeal said as follows:

The mere fact that the appellant had been engaged purely as a statutory auditor did not *ipso facto* preclude the existence of a duty to unmask or prevent fraud. The observations of Moffitt J in *Pacific Acceptance Corporation Ltd v. Forsyth* [1970] 92 WN (NSW) 29 ("Pacific Acceptance") at 63-64 are apposite in this regard:

To date I have considered the duty of an auditor where he discovers matters which in the first instance, or eventually, lead him to suspect fraud. A somewhat different question arises as to the place, if any, the possibility of fraud plays in a "statutory audit". There was a considerable debate on this matter. The defendants' approach was not altogether clear but was inclined to deny its existence in a "statutory audit", then [sic] rather to concede it, but approach it as minor or insignificant. However, it is clear that in planning and carrying out his work an auditor must pay due regard to the possibility of error or fraud. Once it is accepted that the auditor's duty requires him to go behind the books and determine the true financial position of the company and so to examine the accord or otherwise of the financial position of the company, the books and the balance sheet, it follows that the possible causes to the contrary, namely error, fraud or unsound accounting, are the auditor's concern.

- A The matter cannot be dismissed by reference to the well-known *dicta* regarding suspicion and metaphors concerning dogs and detectives, for such are rather directed to the auditor's state of mind and do not suggest that a careful auditor, without suspicion in his mind but doing his duty,
- B will pay no heed to the reality that there is always a material possibility that human frailty may lead to error or fraud in the financial dealings of any organization ...

- [36] Counsel for plaintiff then proceeded to quote from a report prepared by another auditing firm, Ernst & Young. This firm had
- C been called in to review the work of the defendants. They prepared a draft report called the E & Y Report. Briefly stated, the opinion expressed in this review is that the defendants should have sourced the MCD printouts directly from the MCD terminal or the MCD office. It was conceded in the report that the
- D International Auditing Practice Committee (IAPC) did not issue any specific International Auditing Guidelines (IAGs) for the audit of stock broking companies. However the E & Y Report referred to the guidelines issued by the American Institute of Certified Public Accountants (AICPA) which specifically applies to the
- E auditing of stock brokers. The guidelines are known as "AICPA Audit and Accounting Guide-Brokers and Dealers in Securities". In respect of collaterals, these guidelines stipulated that "the auditor should consider confirming directly with depositories and clearing organisations for security positions held on behalf of the
- F broker". If this stipulation is applied to the instant case, counsel for plaintiff is saying that the defendants should have sourced the MCD printouts directly from the MCD terminal at SSSB or from the MCD office. However, in my opinion, counsel for defendant is right to submit that the court should not give any weight to the
- G E & Y Report. This report, although included in the bundle of documents, was agreed only as to authenticity but not as to contents. The plaintiff did not call the author of the report, which is unsigned and undated, to court. Therefore the defendants lost the opportunity to cross-examine the maker of the report. This is
- H crucial as the E & Y Report is being treated by the plaintiff as an expert report to indict the defendants of professional negligence. Since the author of this report was not called for cross-examination, in my opinion, it is not persuasive of the negligence of the defendants. The IAGs which local auditors have to follow
- I had not provided guidelines on the sourcing of information on

collaterals independently. There is no evidence that the general body of local auditors had followed the American guidelines in the auditing of stock broking companies. With benefit of hindsight, it is easy to say that the defendants should have sourced the MCD printouts directly from the MCD terminal. However, the question is whether by failing to do so, the defendants failed to exercise the standard of care expected of them. In *Professional Negligence* by Rupert M Jackson and John L Powell which was cited in the Singapore case of *Wong Kok Chin v. Singapore Society of Accountants* [1989] 1 LNS 138, the learned authors stated as follows in respect of the standard of care required of an accountant:

In common with other professional men, the standard required of an accountant in carrying out an engagement is that of the reasonable skill and care of an ordinary skilled man carrying out the same engagement.

[37] In the instant case apart, the plaintiff did not call any auditor to testify whether the auditing standards applied by the defendants were wanting. The draft E & Y Report is not conclusive as its author was not called. Furthermore, there is no evidence that it is the general practice of local auditors to apply the American guidelines that are quoted in the E & Y Report. The American guidelines require auditors to confirm directly with depository organisations of securities held by the companies that were being audited. It is also significant that the top management of SSSB which includes the plaintiff failed to detect the fraud by directly sourcing the information in question from the MCD terminal which is directly under their control. The defendants' witness told the court that the MCD terminal was in a secured area of the company. Therefore, they were content to receive the MCD printout from a senior executive such as Winnie Leong who was the Margin Accounts Department Manager. It must also be noted that the Internal Audit Department of the SSSB failed to detect the fraud by sourcing the printout directly from the MCD terminal and comparing it to the shares purportedly held by the company. The Group Audit Committee failed to detect the fraud as well. KPMG, another audit firm that did an audit on the company prior to the defendants, also did not source the MCD printouts directly from the MCD terminal and had also failed to detect the fraud. In the light of similar omissions of all the above

A parties and in the absence of evidence that the reasonable skill
and care of an auditor in Malaysia would have led to the
discovery of the fraud, it is difficult to conclude that the
defendants were negligent in not suspecting that the MCD
printout handed over by a senior executive such Winnie Leong
B was fabricated. I am mindful of the submission of counsel for
plaintiff that an auditor must look at documents himself and not
rely on the assurance of others. In support counsel for plaintiff
cited the following passage from the *Pacific Acceptance Corporation*
Ltd. v. Forsyth [1970] 92 WN (NSW) 29:

C ... *Prima facie* the auditor's job is to check material matters for
himself from available documents and he does not ordinarily do
his job or "audit" if he merely seeks the assurance of another as
to the check that other has made or as to his views as to the
effect of documents.

D [38] In the instant case, the defendants did not accept the word
of any of the SSSB employees that the shares in question existed.
The defendants had requested and obtained the MCD printouts
except that they had no reason to suspect that it had been
E fabricated by Winnie Leong who is a senior executive. They could
not be reasonably expected to operate the MCD terminal at
SSSB themselves as it was in a secured area. Counsel for plaintiff
elicited evidence from Sofiah Idrus (PW2) that the printouts from
the MCD terminal have to be certified by her. However, DW1
F said that there was no such requirement in the company's manual
and the auditors received many documents without certification.
DW1 said as follows:

G Q: The Plaintiff said during his evidence in Court that a proper
MCD report from the terminal must bear the signature and
stamp of the script manager. Are you aware of such a
requirement?

H A: I was in charge of the audit and I was never told of such
requirement. We received all our MCD print outs without
any stamps or signature. I am also not aware of any such
requirements in the company's operations manual. In the
course of our audit, we also received many documents from
all departments in the company and none of them bear any
stamps or signature of the manager. This was not the
practice or procedures in SS in giving documents to the
I auditors.

[39] Furthermore, as the defendants' witnesses testified, they were conducting a normal audit and not a fraud investigation. In the premises, they would have no reason to suspect that the documents handed over by senior executives would have been fabricated. The plaintiff did not call any auditor to give expert opinion that it was the practice in an ordinary statutory audit to check the authenticity of all documents including documents given by senior executives. Therefore, the following testimony of Hudson Chua (DW1) who is an auditor was left unchallenged by rebuttal expert evidence:

Q: An opinion has been given in a draft report by EY that the auditor should be present to observe the printing of data from the MCD terminal (page 43 of Bundle C – the last line on the page. Do you have anything to say about that opinion?

A: I disagree with EY's comment. It is similar to asking me to be present next to an officer keying in the general ledger to make sure that the print out she gives me is correct or requiring me to be in all the board of directors meeting, so that I know that the minutes of the meetings are correct. If it was a fraud case, our approach may be modified. But in any statutory audit of a large corporation, it would be normal to obtain documents from the management of the company.

[40] In fact as counsel for defendants submitted, the author of E & Y Report had said that they were not aware of any exceptional circumstance surrounding the audit. The report stated that:

... if audit evidence such as MCD statements had been skilfully forged and provided to the auditor in the normal course of auditing and there was nothing untoward or exceptional which would have caused the auditor to doubt its authenticity.

[41] In the instant case, there is no evidence of any suspicious circumstances surrounding the annual audit. In the premises there is no reason for them to have suspected that the MCD printouts handed over by Winnie Leong were forgeries. For all the above reasons, I find that the defendants have not breached their duty of care.

Issue No. 4: Whether Any Contributory Negligence?

[42] The defendants pleaded as follows in para. 29.1 as follows:

A Particulars of Negligence

29.1 As the CEO of SSSB, the Plaintiff has acted negligently by his failure or omission to:

- B** (a) read and review adequately the monthly statements of accounts from the Malaysian Central Depository ("MCD") and the daily margin reports;
- (b) conduct reconciliatory exercise between the records in the Back Office System ("BOS") and MCD;
- C** (c) ensure that the level of collaterals recorded in the BOS was correctly reflected in the records of MCD before granting approval to margin facilities;
- (d) discover the discrepancies between the records in the BOS and MCD;
- D** (e) ensure that there were proper and adequate internal control mechanism in place to detect and prevent any fraud committed by any employee of SSSB;
- (f) discover the fraudulent practice committed by the employees of SSSB; and
- E** (g) take all reasonable steps to stop all fraudulent practice from continuing in SSSB.

F [43] Counsel for plaintiff submitted the case of *PlanAssure PAC v. Gaelic Inns Pte Ltd (supra)* and submitted that the issue of contributory negligence can potentially arise under two headings:

- G** ... first, where the company has, by its acts, positively prevented or hindered the auditor from carrying out his duty with due skill and care; and, second, when there has been such negligence that the company may be found to have failed to look after its own interests even though it has appointed an auditor.

H [44] Counsel for plaintiff said that there was no evidence that the defendants were hindered from performing their duty. He then submitted that the only question left was whether the plaintiff had failed to take reasonable care to look after the interests of SSSB and had caused or contributed to the loss suffered. Counsel for defendants submitted that it was the duty of the plaintiff as CEO to ensure that regular reconciliation of the Back Office Records and the MCD printouts was done. Counsel for plaintiff's response

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to this argument is two-fold. Firstly, he submitted that SSSB was a large corporation with several layers of checks and balances below the CEO. He clarified that Winnie Leong, the Margins Accounts Manager was supervised by the General Manager (Operations) and the Chief Operating Officer. The second reason is that the defendants had reported in their audit report that the internal control system was adequate. He added that if there were any weaknesses in the control system, they should have been highlighted to the CEO in a Management letter. With respect, in my opinion, this submission overlooks the crucial point that regardless of the size of a company, the ultimate responsibility for its management lies with the CEO and its Board of Directors. As stated earlier, the duty of care of the external auditors is owed to the shareholders and the company. It is not owed to its managers or its directors. It is for this reason that the management of a company should not abdicate its duty to detect wrongdoings to the external auditors who are performing a statutory audit. Similarly, it may well have been that the CEO had read the audit reports of the defendants that stated that the internal control system of SSSB was adequate. However, it was the duty of the plaintiff in the first place to ensure that the internal control system was adequate in order to detect and prevent fraud. It must not be forgotten that he had the internal auditors as well as his top management team at his disposal to perform this task. Therefore, the plaintiff as CEO is wholly responsible for failing to detect the fraud in question that led to the loss of RM56 million by SSSB. The plaintiff admitted during cross-examination that he delegated the task of reconciling the collaterals of the Back Office Records with the MCD printouts to Winnie Leong. In the premises, it was entirely the plaintiff's responsibility to ensure that she carried out her task diligently and not indulge in fraudulent machinations by doctoring the MCD printouts. It is absolutely ridiculous for the plaintiff to hold the external auditors responsible for his own failure to properly supervise Winnie Leong or to supervise others who should have checked on her work. As I take the view that the defendants did not owe a duty of care to the plaintiff and as it is my finding that the plaintiff was wholly responsible for failing to detect the fraud perpetrated by Winnie Leong, the question of apportioning liability between the plaintiff and defendants does not arise. The plaintiff is wholly to blame for the loss in question.

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A Issue No. 5: Whether Plaintiff Was Forced To Resign?

B [45] Counsel for the plaintiff and defendants have addressed several secondary issues in respect of remoteness of damages. The complaint of the plaintiff is that he was “forced” to resign his post as the CEO of SSSB, as Executive Director of its intermediate holding company (CMS Capital Sdn Bhd) and as a director of the main holding company (CMS Bhd). The damages that he seeks are calculated on the loss of emoluments and benefits over a 13 year period.

C [46] The first issue that must be addressed in respect of the losses that the plaintiff allegedly suffered is whether he was “forced” to resign as CEO because of the losses that SSSB suffered as a result of the fraud that had gone undetected for some time. The plaintiff admitted that he resigned his post with a three months notice in accordance with the terms of his contract but claimed that he was asked by the Group CEO to resign. However, he did not produce the Group CEO (Ali Dewal) to testify on his behalf. He did not produce any documentary evidence to support his evidence that the Group CEO or anyone else in SSSB, CMS Capital Sdn Bhd or CMS Bhd had asked to him resign. His witness, PW1 (Issac Lungun), the former secretary of SSSB testified that the plaintiff was asked to resign. However, PW1 had no personal knowledge whether this is true. The plaintiff had told PW1 that he had been asked to resign. The Group CEO also told PW1 that the plaintiff had been asked to resign. Therefore, the testimony of PW1 on this point is hearsay. The only admissible evidence is from the plaintiff himself who insisted that he had been “forced” to resign. He said that the company had thanked him for his services because it was a “face-saving” courtesy. The fact that he signed the resignation letter was also a “face-saving” way to leave the company. When he was asked what would have happened if he refused to resign, he answered as follows:

H Q: When you said “forced to resign” do you mean that the company would have sacked you if you refused to resign?

A: I am not sure about sack, but I am sure they will make condition difficult for me.

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[47] In my view, this answer strongly suggests that no ultimatum was given to the plaintiff to leave the company. The plaintiff also did not deny that the notice period of three months long was agreed by the company and he was also allowed to sign cheques during that period. This fact also suggests that he left the company while still in good standing. Therefore, apart from his own assertion that he was asked to leave the company, there is no evidence that SSSB had threatened to dismiss him if he refused. It is highly probable that the plaintiff left on his own accord in order to take responsibility for his failure to prevent fraud and in view of the impending criminal investigation which culminated in him and others being charged under the Securities Industry Act 1973. It must be noted that the plaintiff resigned on 30 September 1999 and he was charged on 11 November 1999. For all the above reasons, it is my finding that the plaintiff was not “forced” to leave SSSB. In the premises, there is no foundation for alleging that his losses were caused by the defendants. Assuming that I am wrong on this issue, I shall consider now the other issues pertaining to remoteness of damage.

Issue No. 6: Remoteness Of Damage

[48] The follow up question to the above would be whether the defendants are liable in the event that the plaintiff had been “forced” to resign. In my opinion, even if the defendants had been negligent in the preparation of the audit reports, their negligence is not a causative factor in the resignation or alleged constructive dismissal of the plaintiff. The plaintiff was employed by SSSB. It would have been entirely up to SSSB to determine whether the plaintiff was guilty of misconduct or dereliction of duty by signing off the statutory accounts of the company in April of 1999. On the assumption that SSSB was wrong in dismissing the plaintiff as he was blameless in relying on the clean audit conducted by the defendants, his cause of action would lie against SSSB and not the defendants who did not owe him a duty of care. In the premises, none of the losses suffered by the plaintiff are foreseeable. Even if it is assumed that the defendants had performed their statutory audit negligently, the only damage that was foreseeable is the loss due to the non-existent collaterals. This is a loss suffered by SSSB and not by the plaintiff. Therefore, the claim of the plaintiff of RM41.4 million for loss of emoluments for

A a 13 year period and stock options is completely unjustified. For sake of completeness, I must also add that the claim of the plaintiff which includes loss of profit of RM5 million from the stock option is highly speculative as it had not been approved when the plaintiff left SSSB.

B [49] In conclusion, for all the above reasons, I shall dismiss the claim of the plaintiff with costs to be taxed unless otherwise agreed.

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